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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 161.

HARTFORD LIFE INSURANCE COMPANY,
Plaintiff in Error,

v.

CECILIA BLINCOE, Administratrix of the Estate of ROSA BARBER, Deceased,
Defendant in Error.

In Error to the Supreme Court of the State of Missouri.

BRIEF OF PLAINTIFF IN ERROR AND PETITIONER.

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STATEMENT.

The questions presented by the record in this case are raised upon writ of error and application for writ of certiorari.

The suit was begun by petition filed in the Circuit

Court of Johnson County, Missouri, on June 17, 1911. It was an action by Rosa Barber, the beneficiary named in a policy or certificate of membership issued by the plaintiff in error and petitioner herein to the insured, who was the husband of the beneficiary. The case came to this court upon writ of error sued out from a prior decision of the Supreme Court of Missouri, and the opinion of this court is reported in 245 U. S. 146. The case involved the same kind of contract that was in issue before this court in the case of Hartford Life Insurance Company v. Ibs, 237 U. S. 662. The defense here and there was that the policy had become forfeited by nonpayment of an assessment due and payable under its terms. Here, as there, the beneficiary of the policy contended that the assessment was excessive and, therefore, void, except that upon the last trial of this case it was contended that the excessiveness arose by reason of the inclusion of fifteen cents in the assessment to cover a tax of two per cent to be paid to the state upon the amount of the assessment collected, under a statute of Missouri. The assessment was levied January 29, 1910, and was payable March 1, 1910. The insured died on June 5, 1910, without having paid anything on account of the policy or certificate of membership subsequent to December 6, 1909.

From a judgment in favor of the intestate of defendant in error and respondent (plaintiff below) in the trial court on the second trial, an appeal was prosecuted by plaintiff in error and petitioner to the Supreme Court of Missouri, which last named court was the highest court of the state in which a decision in the suit could be had and the judgment of which court in this case is final. The judgment of the Supreme Court of Missouri, which is now sought to be reviewed, was rendered June 2, 1919 (Rec., p. 455), and the motion of plaintiff in error and petitioner for a rehearing was overruled on July 9, 1919 (Rec., p. 459).

Thereupon the plaintiff in error and petitioner procured a writ of error and also filed in this court its petition for a writ of certiorari.

After the issuance of the writ of error the plaintiff in error died and the cause was revived in the name of the administratrix, the present defendant in error and respondent.

The statement in the opinion of this court in the case of Hartford Life Insurance Company v. Ibs, 237 U. S., l. c. 666 et seq., will furnish the Court with a clear conception of the plan of insurance involved and the conduct of the business by the plaintiff in error and petitioner, and accordingly we quote such statement, as follows:

"The Hartford Life Insurance Company, though a stock corporation under the laws of Connecticut, had what was known as the 'safety fund department,' conducted on the mutual assessment plan. The company kept the books, levied the assessments, deposited the collections in the Mortuary Fund, and paid claims therefrom as they matured. It was not otherwise liable on the policies.

"The mutual insurance plan contemplated the creation of a safety fund of $1,000,000 from membership fees. In addition to this there was to be a mortuary fund raised by graduated assessments levied on all the members for use in payment of death claims. These assessments were levied periodically and provision was made that in fixing the amount to be levied an allowance should be made 'for discontinuance in membership.' It so happened that the lapses were not so numerous as had been estimated and consequently each assessment realized something more than was needed to pay the matured claims. This difference, between the collections and the insurance paid, was retained in the mortuary fund, and, in time, the 'excess margins' amounted to nearly $400,000.

"In 1908 (1899) the Hartford Life Insurance Company determined to discontinue the safety fund department and to write no more insurance on the assessment plan. Thereafter no new members were admitted. This change of policy was the occasion of a disagreement between the certificate holders and the company. Accordingly,

Dresser and thirty other members, residing in different states, brought suit in a Connecticut court, 'in their own behalf and on behalf of all others similarly situated,' against the company, its directors and trustees. The bill attacked the management of the company and, among other things, insisted that it had been and was still levying assessments too many in number and too large in amount. The bill also alleged that the company had recently decided to discontinue writing insurance on the assessment plan and was endeavoring to induce members to surrender their certificates and to take out ordinary life policies in the company's stock department. By reason of this change of policy and the consequent decrease in membership in the safety fund department and the increase in assessments the bill alleged that the present certificate holders, who had created the mortuary fund, were entitled to an immediate distribution of the moneys therein.

"The company's demurrer was sustained and the bill dismissed. Dresser and the other certificate holders then took the case to the Supreme Court of Connecticut where the judgment was reversed (80 Connecticut, 681). The case having been remanded, there was an answer and a hearing. On March 23, 1910, the Court made findings of law and fact, many of which are not material to the matter involved in the present litigation. In reference to the mortuary fund, the trial court found that, though acting in good faith, the company in making assessments had

overestimated the number of lapses in membership and, consequently, the assessments had raised more than was needed to pay claims; that these excesses or margins had accumulated and amounted to many thousands of dollars; that these excess collections were in the mortuary fund and 'are now in constant use in the prompt payment of losses in advance of the receipt of the moneys to pay the same from the regular assessments, by which receipts the said fund is constantly reimbursed.

" 'The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said balance of margins should be distributed among the outstanding certificate holders, but it is held that it is proper and reasonable that the company should hold such fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the company should hold more than the amount of one average quarterly assessment for the previous year.

" '* * * The mortuary fund arising as above described or from any other source together with all income or interest thereon, belongs to the Men's Division of the Safety Fund Department, and the Insurance Company is reasonably entitled to hold the same as a necessary and proper fund for the settlement of death claims on the certificates of insurance in said department, and that any excess above the average of the quarterly assessment for the previous

> year shall be distributed in diminution of assessments by crediting and applying such excess on account of the next succeeding assessment.' "

There was duly pleaded and offered in evidence at the trial an exemplified copy of the record of the Superior Court of New Haven County, Connecticut, in the case of Charles H. Dresser and others v. Hartford Life Insurance Company and others (referred to in the above statement), to which cause the insured, Frank Barber, was a party by representation, the effect of the decree in which case was involved and passed upon by this Court when this case was here before, and also by the decision of this Court in the case of Hartford Life Insurance Company v. Ibs, 237 U. S. 662.

The certificate of membership or policy provides (Rec., p. 432) that the member "agrees to pay said company within thirty days from day on which notices bear date, all Mortality Calls determined as within set forth," and then provides (Rec., p. 433):

> "But if the laws of any country, state, county or municipality shall require a tax to be paid by said company on account of such payments, then the mortality calls hereon shall be determined so as to cover such tax."

The certificate of membership or policy of insurance also provides, among other things, that (Rec., p. 433):

> "3. The member further agrees and accepts this certificate upon the express condition that if either the annual dues, mortality calls or safety fund deposit, as hereinbefore required, are not paid to said company on the day due, then this certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said company or the trustee of the safety fund."

As shown, the certificate of membership or policy was of the **assessment** type, and provided that the quarter days for the payment of mortality calls "shall be the first day of March, June, September and December in each year" (Rec., p. 434).

As to the **dues** the certificate provided that the member agrees to pay the company for expenses, dues of three dollars per annum on each $1,000 indemnity, or by pro rata installments of the same, **in advance**, for periods of less than a year (Rec., p. 432).

Section 7099 of the Revised Statutes of Missouri, 1909 (which had substantially been in force since 1889, Rev. Stats. Mo. 1889, Sec. 5958), provides as follows:

"Every insurance company or association **not organized under the laws of this State** shall * * * annually pay a tax upon the premiums received * * * in this State * * * for insurance of life * * * at a rate of two per cent per annum in lieu of all other taxes, * * * which amount of taxes shall be assessed and collected as hereinafter provided."

Subsequent sections of the statute empower the Superintendent of the Insurance Department to make the assessment and enforce collection thereof.

The record shows (Rec., pp. 141, 261) that the State of Missouri exacted and the company regularly paid to the State a tax on the assessments collected from its members in Missouri, and that a similar tax had been included in every assessment or call against the insured, Frank Barber, from March 1, 1894, to December 1, 1909 (Rec., p. 379).

Upon the former writ of error No. 253, October Term, 1916, the record showed (page 128) that the assessment in question included the fifteen cents tax payable to the State of Missouri, and that similar taxes had been collected and paid to the State in previous years (former Rec., p. 243), and the record now here shows exactly the same facts and also that the assessment in question was made and levied in the same manner as the previous calls (present Rec.,

p. 344) and that a similar tax was included in each assessment upon the certificate in suit since March 1, 1894 (present Rec., p. 379).

Upon the former writ of error the defendant in error contended both in the brief and printed argument (pages 11 and 24 of brief of defendant in error on former writ of error) that the inclusion of this tax rendered the assessment void, and it was urged that this necessitated an affirmance of the judgment complained of, but notwithstanding these facts this Court reversed the former judgment of the Supreme Court of Missouri.

After the cause was remanded and upon the second trial thereof, the plaintiff in the trial court urged the same question upon the trial court. The defendant in the trial court (plaintiff in error and petitioner here) thereupon requested instructions numbered XIV to XVIII (Rec., pp. 401, 405), all of which were refused, and to the refusal to give which the the defendant excepted. Those instructions are as follows:

XIV.

"The Court instructs the jury that it is specifically provided by the certificate or policy in suit that if the laws of any state shall require a tax to be paid by the defendant on account of mortality calls or assessments payable by the holders of such certificates, such mortality calls

or assessments to be levied by the defendant under such certificates shall be computed so as to cover and include such tax; that it is specifically provided by Section 8043, R. S. Mo. 1899, in force at and prior to the levy of said assessment or call 126 against the said Frank Barber under the policy or certificate in suit, that every insurance company or association not organized under the laws of the State of Missouri shall pay annually a tax upon the premiums received for insurance of life in the said State of Missouri; that the defendant company, in compliance and in accordance with the laws of the State of Missouri, filed with the insurance department of the State of Missouri annual reports for the years ending December 31, 1909, and December 31, 1910; that said reports so filed by the defendant company with the insurance department contained the amount of mortality calls or assessments collected by the defendant company on certificates in its safety fund department held by citizens of this State, for the years ending December 31, 1909, and December 31, 1910, respectively; that after the filing of said reports as aforesaid, the insurance department of the State of Missouri computed and ascertained from said reports the amount of the tax payable by the defendant company on premiums or assessments collected by it from holders of certificates in the safety fund department residing in the State of Missouri; that it appears from the undisputed evidence that in computing said tax the said insurance department included and

assessed the defendant upon all assessments or mortality calls collected by it under certificates held by persons in the State of Missouri and demanded of the defendant the payment of tax computed and based upon all of the assessments paid to defendant under the certificates held by persons in the State of Missouri, which said tax, so computed by the insurance department as aforesaid, was paid by the defendant; and under the circumstances, the Court instructs you that you cannot find from the evidence that the assessment or call 126 levied against the insured under the certificate sued on herein was illegal and void because it included two per cent of the amount of said assessment as a tax to the State of Missouri on account of such assessment."

XV.

"The Court instructs the jury that they cannot find in this case that the assessment or mortality call No. 126 levied against the insured, Frank Barber, was illegal or void because of the fact that two per cent of the amount of said assessment was demanded of the said Frank Barber by defendant as a tax payable to the State of Missouri on account of such assessment."

XVI.

"The Court instructs the jury that the defendant herein was merely acting as trustee for the said Frank Barber and all other certifi-

cate holders in the safety fund department of the defendant company in the levy and calculation of assessments under the certificate in suit and all other certificates issued in the safety fund department of the defendant company; that in the exercise of the powers and duties imposed upon the defendant as such trustee the defendant is only obligated to exercise that care and prudence which an ordinarily prudent person would exercise under the same or similar circumstances, and that the defendant as such trustee is not liable to the holders of such certificates for mere errors of judgment in the computation and levy of such assessments; that it is specifically provided in the certificate or policy in suit that if the laws of any state shall require a tax to be paid by the defendant on the mortality calls or assessments payable under such certificate, such mortality calls or assessments shall be determined so as to cover and include the amount of such tax; that it is provided by Section 8043, R. S. Mo. 1899, in force at and prior to the time of the levy of the assessment or call 126 under the policy in suit, that every insurance company or association not organized under the laws of the State of Missouri shall pay annually a tax upon the premiums received for insurance of life in the State of Missouri; that the action of the defendant in including in said assessment or mortality call 126, two per cent of the amount thereof as a tax due the State of Missouri, was a mere error of judgment on the part of the defendant and the Court

therefore instructs you that you cannot find that said assessment or mortality call 126 levied against the said Frank Barber was illegal or void because it was computed so as to include two per cent of the amount of said assessment as a tax due to the State of Missouri on said assessment."

XVII.

"The Court instructs the jury that it was adjudged by the Supreme Court of the United States on the former appeal of this cause that assessment or call 126 levied by the defendant against the said Frank Barber under the certificate or policy sued on herein, was valid and legal, and that the plaintiff is now estopped by reason of such finding and holding of the Supreme Court of the United States in this cause from asserting that said assessment or call is illegal, excessive or void."

XVIII.

"The Court instructs the jury that the plaintiff is estopped by the decision and judgment of the Supreme Court of the United States on the former appeal of this case from asserting that assessment or call No. 126, levied against the said Frank Barber by the defendant under the certificate sued on herein, was illegal or void because of the fact that two per cent of the amount of said assessment was demanded of the said Frank Barber by the defendant as a tax payable to the State of Missouri on account of such assessment."

Although the judgment now sought to be reviewed was the result of the second trial of the case, and notwithstanding that the judgment against the plaintiff in error or petitioner at the first trial had been reversed, and, in the absence of any evidence that plaintiff in error and petitioner here had "vexatiously refused to pay" except the mere fact that it had not paid the amount of the policy to the respondent, the trial court, over the exception of plaintiff in error and petitioner gave the following instruction requested by respondent (Rec., p. 380):

> "And the Court further instructs the jury that if you find and believe from the evidence that the defendant, before the institution of this suit, refused to pay plaintiff the amount of the policy sued upon, and shall further find and believe from all the facts and circumstances shown by the evidence that its refusal to pay was vexatious, that is, without reasonable cause, then you may also allow her in addition to the amount of the policy sued upon and interest thereon, a sum not exceeding 10 per cent of the amount of the policy sued upon, together with a reasonable attorney's fee, said attorney's fee not to exceed the sum of $750.00, and should return a verdict for the aggregate sum."

And refused, over the objection and exception of defendant, to give the following instructions requested by defendant (Rec., p. 408):

XXIII.

"The Court instructs the jury that the plaintiff is not entitled to recover against the defendant anything by way of damages and attorney's fees."

XXIV.

"The Court instructs the jury that there is no evidence in this case that the refusal of the defendant to pay the plaintiff the amount claimed by her under the policy in suit is or was vexatious, and that the plaintiff is not entitled to recover damages or attorneys' fees against the defendant."

XXV.

"The Court instructs the jury that the undisputed and uncontradicted evidence in this case establishes that the refusal of the defendant to pay to the plaintiff the amount claimed by plaintiff under the policy in suit was made in good faith and was not vexatious and that the plaintiff is not entitled to recover damages or attorneys' fees against the defendant."

XXVI.

"The Court instructs the jury that Section 7068, Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri for 1911, p. 282, in amendment thereof, if held or construed as authorizing a recovery by plaintiff for damages and attorneys' fees against the defend-

ant herein, are unconstitutional and void and deprive the defendant of its property without due process of law and deny to defendant the equal protection of the law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that there is no evidence in this case that the refusal of the defendant to pay the plaintiff the amount claimed by her under the policy in suit is or was vexatious."

SPECIFICATION OF ERRORS RELIED ON.

The errors of the Supreme Court of Missouri relied upon by plaintiff in error and petitioner are the following:

1. The Court erred in sustaining the action of the trial court in giving to the jury that portion of the instruction requested by the plaintiff which authorized the assessment against defendant of damages and attorney's fee (Rec., p. 290) for the reason that the statute of Missouri, Section 7068 Revised Statutes of Missouri, 1909, as amended by the Act of March 30, 1911 (Laws of Missouri for 1911, p. 282), is unconstitutional and void because the same is in violation of Section 10, Article I of the Constitution of the United States, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and because the construction thereof by the courts of Missouri in this case constitutes a rule of judicial construction violative of said provisions of the Constitution of the United States, and because the application of said statute to the facts of this case denies to the defendant due process of law as guaranteed to it by the Constitution of the United States.

2. The Court erred in sustaining the action of the trial court in submitting to the jury the question of

the imposition against appellant (defendant) of damages and attorney's fees as for vexatious delay; that Section 7068 of the Revised Statutes of Missouri, 1909, as amended by the Act of March 30, 1911 (Laws of Missouri for 1911, p. 282), as construed by the trial court to apply to the facts of this case, is unconstitutional and void, because the statute, as so construed, deprives the defendant of its property without due process of law, and as so construed the statute aforesaid is repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and, therefore, unconstitutional and void.

3. The Court erred in sustaining the action of the trial court in refusing to instruct the jury, as requested by the appellant (defendant), that upon the former writ of error in the Supreme Court of the United States in this case, the particular assessment or call in question No. 126 levied against the insured, Frank Barber, under the certificate or policy sued on herein was declared valid and legal and by reason of such finding and holding of the Supreme Court of the United States the plaintiff was estopped from asserting the contrary.

4. The Court erred in not holding that the question of the inclusion of the fifteen cents tax, in assessment No. 126 levied against the insured, Frank Barber, was not properly before the trial court for

the reason that all questions concerning that tax were necessarily before the Supreme Court of the United States upon the former writ of error in this case in that court and the decision on that writ of error became the law of the case controlling upon the trial court on the second trial of said case and upon the Supreme Court of the State upon the appeal from such second trial.

5. The Court erred in holding that the inclusion of fifteen cents in the assessment or call No. 126 against the insured, Frank Barber, to cover the tax of two per cent paid by appellant to the State of Missouri under the provisions of Section 7099 of the Revised Statutes of Missouri, 1909, rendered such assessment excessive and void, and that the nonpayment of such assessment constituted no ground for the forfeiture of the insurance; that in so holding the Court has failed to give full faith and credit to the decree of the Superior Court of New Haven County, Connecticut, in the case of Dresser et al. v. Hartford Life Insurance Company et al. (an exemplified copy of the record and decree in which case was offered and received in evidence at the trial of this cause), contrary to and in violation of Article IV, Section 1 of the Constitution of the United States, in this (1) that said assessment or call 126 was adjudged to be valid and lawful by the Connecticut court in the Dresser decree; (2) that under

the Dresser decree it was adjudged that an excess in an assessment, if any, should not vitiate or invalidate the assessment, but should simply render the succeeding assessment subject to credit for such excess; and (3) because it was held by the Court of Connecticut in the Dresser decree that the mortuary fund of the safety fund division was only subject to and liable for the payment of certificates matured by the deaths of the holders thereof in the event that all assessments had been paid by the holders thereof during their lifetime and the continuance of said certificate, whereas the trial court and the Supreme Court of Missouri hold that the certificate in suit is payable out of the mortuary fund notwithstanding the conceded and admitted fact that assessment or call 126 levied against the insured prior to his death was not paid when due.

For which errors the plaintiff in error prays that the judgment of the Supreme Court of the State of Missouri may be reversed and that the cause be remanded with such directions as, according to law and justice, shall seem meet and proper to the Supreme Court of the United States.

ARGUMENT.

The Decision of the Supreme Court of Missouri Is at Variance With the Law of the Case as Established by the Decision of This Court on the Prior Writ of Error.

Before proceeding to a discussion of the questions involved in the above headline, we desire to present a few observations concerning the decision sought to be reviewed.

This Court in its opinion on the former writ of error (245 U. S., l. c. 150) characterized the basis of the decision of the Supreme Court of Missouri as a "make-weight." If such statement was justifiable as to the former decision of the Supreme Court of Missouri, it most certainly is applicable to the decision now sought to be reviewed.

The decision under review is based wholly upon the ground that defendant included in the assessment the sum of 15 cents to cover a tax of 2 per cent, which the State of Missouri was demanding of it (under the provision of an Act which was on the statute books of the State since 1889), and which defendant paid and had been paying for many years. The decision of

the Supreme Court of Missouri, which held that the tax did not apply to assessments, was rendered more than six years after the assessment in question was levied, and that decision was by a divided court, four to two, so that the question of the application of the statute to assessments was not sufficiently free from doubt to call forth a unanimous decision from the Supreme Court of that State (Bankers' Life Co. v. Chorn, 186 S. W. 681, decided May 15, 1916).

The Supreme Court of the State in the case at bar based its decision upon what we believe to be wholly untenable non-federal question, which does not sustain the judgment in this case (Ward v. Board of County Commissioners, 40 Sup. Ct. Rep., l. c. 421, and cases cited).

No claim is made that the company was acting in bad faith in including the 15 cents in the assessment. It is to be remembered that the insured was one only of 11,000 members. The defendant was acting for those members. It was the representative of the insured in dealing with his co-members. What it deemed a proper charge against him it also charged to the other 10,999 members who were in the same class as the insured; so that whatever the defendant did as to the insured in representing the 10,999 members, it also did as to the 10,999 members in representing the insured. Therefore, the

consequences of its acts were the same as to all, and really constituted the act of the members themselves. There can be no question that if a particular member is imposed upon by charging him a greater proportion than his share under the contract, he should have a remedy against his co-members. But that is not this case. The record here shows that every member was assessed his proportionate share of the death losses, plus the tax which the State exacted upon his assessment. Neither the defendant nor the co-members of the insured profited by the assessment of such tax, because, as the record shows, the whole amount thereof was paid to the State which exacted the tax.

Defendant Not Licensed as Assessment Company in Missouri.

Defendant was also justified in assuming that it was liable for the tax, even if assessments levied by companies licensed to do business in the State were not so liable for the following reasons:

Section 7099 of the Revised Statutes of Missouri 1909 (quoted at page 9 hereof) required every insurance company or association not organized under the laws of Missouri to pay a tax of 2 per cent on the premiums collected in the State.

Section 6954 of the Revised Statutes of Missouri 1909 (Article III, relating to insurance on the assessment plan), provides:

> "Corporations organized or doing the business of life insurance **under this article** shall provide for the accumulation of an emergency fund which shall not be less than the proceeds of one death assessment on all policy or certificate-holders thereof; * * * said fund shall be accumulated by existing corporations within six months from the date of accepting the provisions of this article; * * * which fund, together with the income thereon, shall be a trust fund for the payment of death claims or other benefits provided for in their policies or certificates, and shall be invested in securities in which insurance companies are allowed by law to invest their capital. These securities shall be deposited in trust with the Superintendent of the Insurance Department of the State. * * * If, in any period of six months the death rate of any such corporation shall be in excess of the annual rate of mortality as shown by the American Life tables, it shall be lawful for such corporation to draw out any portion of said securities necessary to meet such excess."

There is no evidence whatever that the defendant ever accepted the provisions of Article III, or that it ever received or sought a license to do business in Missouri upon the assessment plan, and, in fact, it

never did qualify under the above article. Indeed, it could not have done so under the provisions of the certificates of membership issued to its members.

In the first place, the evidence shows (Rec., p. 77) that in 1867 the defendant began writing legal reserve insurance, and so continued until the end of 1879; in the early part of 1880 it began to write the safety fund business, such as the certificate in suit; the latter business it continued to write until 1899, and it then resumed the writing of legal reserve insurance to the exclusion of safety fund insurance, and so continued until 1913; but during all of the period from 1879 to 1913 it had in force legal reserve contracts, some issued prior to 1879, and others issued subsequent to 1899 (Rec., pp. 225, 268), consequently, the corporation defendant was not one organized and subject to the provisions of Article III, Chapter 61, of the Revised Statutes of Missouri 1909.

In the second place, the company did not and could not accumulate the emergency fund required by the Missouri assessment article. The certificate issued to the insured, as well as all other certificates issued by the company, provided for the payment of ten dollars on each one thousand dollars of insurance, to create a safety fund, which the certificate provided should be deposited with the trustee of that fund for the specific purposes set forth in the certificate or policy.

The certificate also provided for the payment by

the member "of all mortality calls proportioned to the indemnity herein provided for, levied against the herein-named member **to form a mortuary fund for payment of all indemnity matured by deaths of members.**"

The Company, therefore, was limited in the application of any money which came into its hands by the contract aforesaid, between it and the insured. It was powerless to accumulate any fund other than the Mortuary Fund, and the amount of this Mortuary Fund was limited by the terms of the Connecticut decree in the Dresser suit (Ibs case, 237 U. S., l. c. 668) to a quarterly assessment equal to the average of the four preceding quarterly assessments, and, by the terms of the certificate, said fund was to be "in no wise chargeable or liable for any use or purposes other than for the settlement of death claims." The record shows (Rec., p. 134) that the average monthly death losses in 1909, the year immediately preceding the assessment in question, exceeded one hundred thousand dollars per month. The record also discloses that the average amount of the four preceding quarterly assessments was about three hundred thousand dollars, so that the latter sum was the extreme limit that the Company might accumulate in that fund. It was impossible, therefore, for the Company to invest any of its funds in securities as required by the assessment laws of Missouri, and replenish this

fund whenever its losses exceeded the designated Mortality Table, for the reason that its death losses were in excess of one hundred thousand dollars per month, and it was necessary to constantly resort to the Mortuary Fund for the purpose of making prompt payment of death claims between assessment periods (which the contract provided should be made quarterly) in order to preserve the integrity of the plan of insurance, and there is no warrant in the contract for the accumulation and investment of a fund other than the Safety Fund, which is in the hands of another company as trustee.

This Missouri assessment law was undoubtedly designed for **mutual** assessment companies with the thought that its requirements could be complied with by **legislation** by the **legislative and representative** body, which is a prominent feature of **mutual assessment concerns** rendering their **schemes of insurance** subject to **organic legislative modification**. No such thing here. The defendant had, and has, outstanding contractual obligations as unalterable as the laws of the Medes and Persians. It simply could not conform to the Missouri assessment article.

Non-Licensed Foreign Assessment Company Liable to General Insurance Laws in Missouri.

It was the law in Missouri that a foreign corporation doing a life insurance business in Missouri was

not entitled to the benefits and exemptions of article III relating to insurance on the assessment plan unless such corporation secured a license under the provisions of the act, and that to operate without such license would subject the corporation to the general insurance laws of the State. Thus, in Schmidt v. Foresters, 228 Mo., l. c. 700, the Court says:

> "It (the insurance company) cannot claim the benefits of the law merely because its contracts are of the character mentioned in the law, but to claim the exemption given it must come in under the law, **and make its contracts under the law.** If it does that, then the law is read into and becomes a part of the contract, **but until it does do that the general law is and must be read into each and every one of its contracts** made with a citizen of Missouri."

So that not only did the company act in good faith when it included the fifteen cents' tax in the assessment, but it was justified in doing so both because the Insurance Department was demanding the payment under circumstances apparently justifying the action, and the decisions seemed to make the company liable because of the absence of a license.

Law of the Case Under Former Decision of This Court.

But, be that as it may, the effect of the inclusion of this tax in the assessment was presented to this court by the defendant in error on the former writ of

error, and it was then claimed and urged by the defendant in error that, irrespective of the other questions involved, the inclusion of the tax rendered the assessment void and necessitated an affirmance of the judgment then before the court. To support which contention defendant in error cited the authorities which will be found on page 25 of the brief of defendant in error on the former hearing in this Court. (Case No. 252, October Term, 1917).

The concrete question before this Court on the former writ of error was whether or not the particular assessment which included the fifteen cents' tax, was authorized by the Connecticut decree in the Dresser case. Necessarily involved in that inquiry was the question whether or not the fifteen cents included therein was payable. This Court answered the inquiry in the affirmative. This Court could not have held that this assessment was authorized by the Connecticut decree and at the same time hold that it was void because it included the fifteen cents' tax. The Court said (245 U. S., l. c. 149):

> "It is obvious from the evidence that this assessment was levied in the usual way adopted by the company and **tacitly sanctioned by the Connecticut judgment.**"

It is true that the opinion of this Court on the former writ of error does not discuss the question of the inclusion of the tax, but the question was in

the record, was necessarily involved, and was presented to this Court. If that tax rendered the assessment void then, of course, the other questions were of no moment and the judgment attacked must, of necessity, have been affirmed. The important question presented at that time, as here, was as to the validity of the assessment. If the assessment was void for any reason, the matter was at an end, and the result must have been an affirmance of the former judgment."

It necessarily follows that the trial court should have ruled that the question of the validity of the assessment, because of the inclusion of the fifteen cents' tax, had been adjudicated, and it should have given the instructions requested by plaintiff in error and petitioner.

Questions of the character here involved have been the subject of consideration by this Court many times. For instance: In Gould v. Evansville, Etc. R. R., 91 U. S., l. c. 532, the Court says:

> "Where the parties and the cause of action are the same, the prima facie presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue; the rule in such a case being, that where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented in that trial, the matter must be considered as hav-

ing passed in rem judicatam, and the former judgment in such case is conclusive between the parties."

The case of United States Trust Company v. New Mexico, 183 U. S. 535, involved an action for the foreclosure of a mortgage given by a railroad. The Territory of New Mexico filed an intervening petition claiming a lien for and payment by the receiver of certain taxes. The lower court ordered the intervening petition dismissed on the ground that the "matters and things therein set up" were "not sufficient to entitle the said intervening petitioner to the relief sought by its petition," which ruling upon appeal to the Supreme Court of the United States was reversed and the cause remanded for further proceedings.

After remand, a decree was finally entered in favor of the Territory for a less amount than it claimed, and both parties appealed.

On the second appeal the Supreme Court said (page 539):

> "The District Court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this court of such an order is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such prima facie validity, **not merely against objections which were in fact made, but also against those which might have been made.**" (Citing cases.)

The case of Chaffin v. Taylor, 116 U. S. 567, was an action in trespass de bonis asportatis. The defendant justified the taking as Treasurer of Henrico County, Virginia, charged with the duty of collecting taxes due the State, which on demand the plaintiff had refused to pay. To this plea the plaintiff replied that he tendered payment of amount due in coupons cut from bonds of the State receivable in payment of taxes, by virtue of an act passed March 30, 1871.

To this reply defendant demurred that by the act of January 26, 1882, he was forbidden to receive coupons in payment of taxes, and that by Act of March 13, 1884, an action for trespass did not lie. On this demurrer judgment was rendered for defendant, which was reversed by this Court on the ground that the statutes referred to were unconstitutional as impairing the obligation of the contract entered into by the State with the holders of the bonds, and the cause was remanded with directions to proceed therein in conformity with the law and the opinion of the Supreme Court.

The trial Court then permitted defendant to file a rejoinder to the reply, setting up an act of January 24, 1882, under which the collector was permitted to receive such coupons only for identification and verification, and alleging that plaintiff was unwilling to conform to said last mentioned act. To this rejoinder a demurrer was filed and on such demurrer judgment

was entered for defendant, the trial court being of the opinion that because the act of January 24, 1882, was not before the Supreme Court, the question was open for its decision. On writ of error from this latter judgment this Court, referring to its former decision, said:

> "It was there decided that the taxpayer had a contract right to pay his taxes in coupons, that a tender of them for that purpose, as to subsequent steps to collect the tax as delinquent, was equivalent to payment, and that a seizure of property under a levy thereafter for their non-payment was a trespass, notwithstanding any act of the General Assembly to the contrary, for such an act, being in breach of the obligation of the contract of the State, is unconstitutional, and therefore null and void.
>
> "The rejoinder of the defendant allowed to be filed after the judgment of reversal, therefore, **sought again to draw in question the very matter which had been already finally adjudged by this Court in the same case.** It did not deny the genuineness of the coupons tendered, nor the fact of tender, and the question of law broadly decided on the demurrer to the replication necessarily involved **every defense**, arising as matter of law, **that could be made** upon any existing acts of the General Assembly of Virginia, for the whole law of the case, as to the plaintiff's legal right to recover on his cause of action, was presented by the pleadings, **and was concluded by the judgment of reversal.**

"As was said in Clark v. Keith, 106 U. S. 464, 'that question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit.' This rule was distinctly stated in Supervisors v. Kennicott, 94 U. S. 498, where numerous authorities are cited, beginning as early as Himely v. Rose, 5 Cranch, 313."

In an early case (Tyler v. Magwire, 17 Wall., l. c. 283), this Court said:

"Brought here as the cause is by a second writ of error, it is settled law in this Court that nothing is brought up for re-examination and revision except the proceedings of the subordinate court subsequent to the mandate. It has been settled, says Mr. Justice Grier, by the decisions of this Court, that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. **None of the questions which were before the Court** on the first writ of error can be reheard or examined upon the second, as it would lead to endless litigation."

The same rule is announced by many of the appellate courts of the country, some of which we will now refer to. In the case of Pitkin v. Shacklett, 117 Mo. 548, the validity of certain taxes was raised after the

case had been remanded to the trial court. The opinion of the Court upon the second appeal from the action of the trial court in overruling the objection to the allowance of such taxes, is as follows:

> "MacFarlane, J.—This is a second appeal in this case. The opinion of the former appeal is reported in the 106 Mo., on page 574. The judgment was then reversed and the cause remanded with directions to the Circuit Court to enter judgment in favor of plaintiffs for the **proper proportion of the amount paid by the** purchaser at tax sale for the whole tract, subsequent taxes paid by plaintiff or the purchaser with penalties and interest as provided by section 219, page 1206, 2 Wagner's Statutes. The amount for which the land was sold at tax sale, and the amount of subsequent taxes paid, with dates of payment, appeared in the record. The mandate simply requires a calculation of the penalties and interest, required by the statute to be paid, and the proportion thereof chargeable to this land. The Court seems to have literally followed the mandate.
>
> "On the trial the defendant made objections to the allowance of the amount of taxes, paid subsequent to the tax sale, on the ground of some irregularity in the assessment and levy. The Court overruled the objection for the reason that, under the mandate of the Court, these matters were not open to further inquiry. In this the Court did not err. **On the former trial the validity of the taxes was not questioned, and their legality was adjudicated under the judgment of**

> **this Court,** and the question could not be reopened (Stump v. Hornback, 109 Mo. 277; Hickman v. Link, 116 Mo. 123, and cases cited). Judgment affirmed. All the judges concur."

In Hill v. Draper, 37 S. W. (Ark.) 574, the Supreme Court had passed upon a conveyance of partnership property to a creditor of one of the partners setting aside the sale to the creditor and remanding the case for further proceedings consistent with its opinion. The trial court thereafter permitted defendants to amend their answer and then upon evidence as to facts which were known to defendants before and at the time the cause was first heard, it was held that plaintiffs were estopped to complain of the sale, and dismissed the complaint. The Court, quoting from a prior decision, says:

> "It results from the nature and supremacy of this Court that no inferior tribunal can review, alter, or modify its judgments or decrees, for any supposed error, **or for any matter which might have** been considered here,"

and accordingly reversed the decree of the trial court.

In the case of Castleman v. Buckner (Ky.), 202 S. W. 681, an appeal had been prosecuted from a ruling upon exceptions to a sale. On the second appeal exceptions were urged because the provisions of the code under which the sale was ordered were not complied with. The Court said, referring to the former appeal:

"No other question was determined and, under the well-recognized rule of practice prevailing in this State, all other questions which were raised, **or could have been raised,** are now res adjudicata. * * *

"Under the res adjudicata rule referred to, the appellant's exceptions cannot be considered on this appeal, even if they possessed merit, which we do not find to be the fact."

In Illinois Life Insurance Co. v. Wortham, 119 S. W. 802, the Court says:

"Several questions are raised by counsel for appellant in brief upon this appeal, which under a long line of authorities cannot now be considered for the reason that they were settled on the former appeal. **Even though these questions were not made where they were such as should or might have been made, and were before the Court, they will be regarded as having been passed on.** This rule has been invariably adhered to in all cases where the opinion does not expressly state that a particular point is not passed upon."

See, also, Clark v. Brown, 119 Fed. 130.

The exact question determined by the Supreme Court of the United States in Hartford Life Insurance Company v. Barber, 245 U. S. 148, was that call No. 126, upon which the insured defaulted, was authorized by the Connecticut decree, was a valid call and properly payable to the insured. This ruling

precluded subsequent contrary contention, as Mr. Justice Brewer said in Trust Company v. New Mexico, 183 U. S. 535:

> "Not merely against objections which were in fact made, but also against those which might have been made."

In Hastings v. Hennessey, 70 Mo. App. 354, the Court reversed the trial court, which held that a bond given in a prior suit was a statutory bond only as to costs, and that as to all other undertakings it was a common-law bond and void for want of consideration. On a retrial the defendants undertook to inject into the case a defense that the complaint in the unlawful detainer suit was fatally defective, whereby the judgment therein was a nullity, etc. The Circuit Court, however, entered judgment on the bond, and, in affirming the latter decision, the Court says:

> "The judgment in this case must be affirmed. The matters now urged must be held to be res adjudicata. The entire record was before us on the first appeal, and the special matters now urged to defeat the liability of the defendants on the bond were presented by that record and were open to dispute and presumptively they were considered by the Court in making its disposition of the case. There would be no end of litigation if this were not the rule (Bevis v. R. R., 30 Mo. App. 564; Bank v. Taylor, 62 Mo. 338)."

In the case of Wellsville Oil Co. v. Miller, 150 Pac. 186, 189, the Supreme Court of Oklahoma, quoting from one of its prior decisions, says:

> "All questions open to dispute, and either expressly or by necessary implication decided on appeal to this court will not be opened for review on second appeal, but such decision becomes the settled law of the case as to all such questions, and is not subject to re-examination."

This case on appeal to the United States Supreme Court was affirmed, 243 U. S. 6.

In re Cook's Estate, 143 Ia. 733, 122 N. W. 578, after a remand of the case to the trial court, a statute of Nebraska was for the first time pleaded as defeating the recovery, but which statute had not been pleaded on the former appeal. The Court said:

> "That the former opinion was res adjudicata, not only as to all matters which were pleaded, but as to all matters necessarily involved and which might have been pleaded, is fundamental."

In Perrault v. Emporium Department Store Co., 83 Wash. 578, 145 Pac. 438, the Court says:

> "This Court has often said that it will not entertain appeals piecemeal. In an unbroken line of decisions we have consistently held that questions determined on appeal, or which might have been determined had they been presented, will not be considered upon a second appeal of the

same action. As to such questions the first appeal conclusively settles the law of the case" (citing many authorities).

In Nashville, C. & St. L. Ry. Co. v. Banks, 168 Kentucky 579, 182 S. W. 660, the Court, after stating that the particular matters relied upon were not grounds of reversal on the first appeal, but were presented to the Court on that appeal, says:

> "The rule long since established in this Court is that where the first opinion does not contain any notice of errors relied on for reversal by the appellant, if these same errors appear upon the second appeal and are relied on for reversal, they will be considered as having been decided adversely to the contention of the appellant upon the first appeal."

We respectfully submit that it was error to hold that the inclusion of the 15 cents rendered the assessment void, because such ruling was contrary to the law of the case as established by this Court on the prior writ of error.

The Supreme Court of Missouri, in Violation of Article IV, Section 1, of the Constitution of the United States, Refused to Give Full Faith and Credit to the Decree of the Connecticut Court in the Dresser Case.

The judgment of the Supreme Court of Missouri is violative of the provisions of Article IV, Section 1, of the Constitution of the United States in that it fails to give full faith and credit to the decree of the Connecticut Court in the Dresser case, because,

1. An assessment levied as was call No. 126, was adjudged to be valid and lawful by the Connecticut Court in the Dresser case;

2. Under the Dresser decree it was adjudged that an excess in an assessment, if any, should not vitiate or invalidate the assessment, but should simply render the succeeding assessment subject to credit for such excess; and

3. It was held by the Connecticut Court in the Dresser case that the Mortuary Fund of the Safety Fund Division was only subject to and liable for the payment of certificates matured by the deaths of the holders thereof in the event that all assessments had been paid by the holders thereof during their lifetime, and the continuance of said certificates, whereas the trial court and the Supreme Court of Missouri held that the certificate in suit is payable out of the

Mortuary Fund, notwithstanding the conceded and admitted fact that assessment or call No. 126 levied against the insured prior to his death was not paid.

We will discuss the foregoing propositions in the order above stated.

1. The Dresser case in the Connecticut Court involved all assessments levied previous to the institution of that suit on October 19, 1906. It was brought by twenty-nine members residing in fifteen states (one of whom was W. O. Oldham, of Springfield, Missouri) for "the benefit of themselves and all others similarly situated", and it was held by this court that the decree in that case was "binding upon all other certificate-holders" (Hartford Life Ins. Co. v. Ibs, 237 U. S. l. c. 672).

The record in the present case shows that every assessment levied against the members in Missouri from March 1, 1894, to December 1, 1909, had included in it the two per cent tax to be paid to the State (Rec., pp. 141, 261, 379).

The suit involved the validity of every assessment made, it being claimed that the company was "levying assessments unnecessary in amount and number", but the Connecticut decree found that

> "The Hartford Life Insurance Company did not levy assessments **unnecessary in amount** or number" (Rec., p. 22a), and

"The Hartford Life Insurance Company levied the assessments **provided for in the plan and in the certificate above set forth**" (Rec., p. 22a).

The Connecticut court, therefore, passed upon the validity of the assessments which included such tax, and to now hold that the inclusion of the tax vitiated the assessment against the insured, fails to give effect to a decree binding upon all the parties, because if the inclusion of the tax rendered call 126 void, every prior assessment was unnecessary in amount to the extent of the tax, and consequently void. It was clearly impossible for the prior assessment to be valid and not be unnecessary in amount if there was included in them any item that would destroy their validity.

2. The Dresser decree, as held by this court on the former writ of error (245 U. S., l. c. 150), contemplated a possible excess in assessments, because as said by this court, the assessment "necessarily was levied as an estimate". All of the circumstances involved in the plan of insurance demonstrates the correctness of this conclusion.

The company was a mere trustee acting for the insured and his co-members. It was his representative as well as the representative of his co-members. It was exacting from him the same contribution that was being required of his co-members. If the insured

saw fit to terminate his membership, neither his co-members nor the company could prevent such action nor enforce payment of the demand, because his contract provided "that failure to make the stipulated payments **shall absolutely terminate** the member's liability therefor." The insured, on the other hand, had the right, after payment of any excess, to insist upon a credit of such excess upon the next succeeding assessment. The termination by the insured of his contract was of no advantage to the company, but a distinct loss, because the company was deprived of its remuneration of $3.00 per thousand of insurance per year, and yet it had no recourse against him.

The plan, as interpreted by the courts, was undoubtedly designed to prevent the very kind of injustice that must follow from a decision such as is here sought to have reviewed. The plan contemplates that all of the members shall be treated alike. It was not designed to mulct the members who performed their agreements in favor of those who failed to do so, simply because the agent or trustee representing all should, through ignorance or mistake, add fifteen cents to an assessment from which none received any benefit. This amount was paid to and retained by the State whose divided Supreme Court now says the State had no right to receive it.

Ethically, if not legally, it is startling to say that

after the State, through its Insurance Department, under whose jurisdiction insurance companies are placed, and whose construction of the statute, under the decisions, "while not conclusive upon the courts * * * is entitled to much weight" (State ex rel. Hayes v. St. Joseph R. R. Co., 135 Mo. l. c. 648; Ewing v. Vernon County, 216 Mo. 681), has required the tax to be paid, should then, through its judicial department, hold that the same payment of the same tax vitiated the assessment on which the State levied and collected the tax. It but indicates the extent to which the Court has found it necessary to go in order to place its decision upon a non-federal ground.

It is to be remembered that this is not an action against the company, as such, for some wrong committed by it. On the contrary, the suit is, in effect, a suit against the co-members of the insured. The certificate holders in this scheme of insurance insure each other; the losses are theirs; the funds collected are theirs; the company is but their agent to make the calculations, receive the collections and make the disbursements for them.

These facts, it seems to us, justify the conclusion that the whole plan contemplated the preservation of the rights of all the members by giving them relief in the event of an erroneous assessment by crediting their future assessments with any excess that might be collected from them.

Even if this was a suit against the company, as trustee, to recover for a loss occasioned by some negligence, it would not be held to a higher duty than that of exercising such care and diligence as an ordinarily prudent man would exercise in the management of his own affairs (King v. Talbot, 40 N. Y., l. c. 85, Jones' Appeal, 8 Watts & Sergeant, 143, 42 Am. Dec. 282; Taylor v. Hite, 61 Mo. 142), and it is not responsible for mere mistakes or errors of judgment (Taft v. Smith, 186 Mass. 31, 70 N. E. 1031; Pine v. White, 175 Mass. 585, 56 N. E. 967; Harkness v. Scammon, 48 Mo. App. 136). In the latter case the Court says:

> "In executing the powers derived from it (the trust instrument) he must use the same skill and prudence that a man of ordinary prudence would use on his own transactions under like circumstances. The law does not cast upon a trustee an extraordinary duty, nor demand extraordinary care, nor hold him liable for mere error of judgment. If he has exercised the care and judgment of ordinary, conscientious, prudent business men in their own affairs he will not be chargeable for his mere errors of judgment" (citing authorities).

Surely, therefore, it could not have been within the contemplation of the parties to this insurance plan that the good faith, but, perhaps, erroneous addition of fifteen cents to an assessment should im-

mediately terminate the obligation of a member to pay and authorize his beneficiary to recover whenever thereafter the defaulting insured shall have passed to the Great Beyond.

Under the plan, it was the privilege and duty of insured to challenge any assessment that was made, and to require reimbursement of any erroneous charge by a credit on his next succeeding assessment. It never was intended to so operate as to enable a member to terminate his obligation to pay, and yet enable his beneficiary to recover if, and whenever, it could be shown that some amount, large or small, had erroneously been added to the defaulted assessment.

3. The Connecticut Court, in the Dresser case, found, among other things, that (Rec., p. 22k):

> "In case of failure of any certificate holders to make payment in accordance with his agreement, his interest in said Safety Fund and all his claims thereon ceased."

The certificate provided that it was issued "In consideration of the representations, agreements and warranties made in the application * * * **and of the further payment of all mortality calls** * * * levied against the herein-named member" (Rec., p. 428). "That ninety days from the receipt * * * of satisfactory proofs * * * of the death of the herein-named member **while this certificate is in force,**

all the conditions hereof having been conformed to by the member * * * there shall be due and payable, **out of the Mortuary Fund, and not otherwise,** the indemnity of two thousand dollars" (Rec., p. 429).

The certificate provided further that (Rec., p. 433):

> "The member further agrees and accepts this certificate upon the express condition that, if either the Annual Dues, Mortality Calls or Safety Fund Deposit, as hereinbefore required, are not paid to said company on the day due, then this certificate shall be null and void, and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said company or the trustee of the Safety Fund; and that failure to make the stipulated payments shall absolutely terminate the member's liability therefor."

The Connecticut court undoubtedly had in mind when it embraced the above-quoted provision in its decree the conditions of the contract or certificate above quoted, and the fact that under other parts of its decree an excess would not vitiate an assessment, but would simply render the subsequent assessment subject to credit for such excess, while on the other hand, if a member failed to make payment, his liability therefor immediately terminated, so that the company was entirely without remedy to collect the as-

sessment or any part thereof. It was necessary, therefore, that the status of a nonpaying member be fixed.

The effect of this provision of the Connecticut decree was, therefore, that the Mortuary Fund of the Safety Fund Division was only subject to and liable for the payment of certificates matured by the deaths of the holders thereof in the event that all assessments had been paid by the holders thereof during their lifetime, since, as said by this Court in the Ibs case (237 U. S., l. c. 670), "failure to pay assessments would work a forfeiture"; but the trial court and the Supreme Court of Missouri held that the certificate in suit is payable out of the Mortuary Fund, notwithstanding the conceded and admitted fact that assessment or call 126 levied against the insured six months prior to his death was not paid.

In the instant case the insured not only failed to pay the mortality call, but he also failed to pay the quarterly dues required to be paid in advance, so that he came squarely within the conditions of the Connecticut decree and that provision of the certificate that a failure to pay **either** the **annual dues** or **mortality calls** shall render the certificate null and void.

We submit, therefore, that the state court failed to give full faith and credit to the Connecticut decrees in the Dresser case, contrary to and in violation of Article IV, Section 1 of the Constitution of the United States.

The decision of the Supreme Court of Missouri in upholding the action of the trial court in permitting the recovery of penalty and attorneys' fees upon the facts in this case, deprives the defendant of its property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

Section 7068 of the Revised Statutes of Missouri, 1909, as amended by the Act of March 30, 1911 (Laws of Missouri, 1911, p. 282), reads as follows:

> "Section 7068. Damages, When Recoverable. In any action against any insurance company to recover the amount of any loss under a policy of * * * life * * * or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the Court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss, and a reasonable attorney's fee; and the Court shall enter judgment for the aggregate sum found in the verdict."

The only evidence on this issue offered on the trial of the case was the fact that plaintiff in error and petitioner had not paid the amount of the certificate, and the fact that its refusal to pay was based upon its interpretation of the contract that the failure of the insured to pay his assessment rendered his certificate unenforcible.

There was no evidence offered, either on the first

or second trial of this case, to show that the refusal of the company to pay the claim was vexatious. The vexatious nature of the defense was left to the jury to be inferred from the defense itself.

The defense on the first trial was that the insured had failed to pay the assessment against him, and, therefore, his certificate of insurance had been by its own terms forfeited. In avoidance of that defense the plaintiff contended that the assessment was void, because, taking into account what was in the Mortuary Fund, it was excessive.

The jury, under the instruction of the Court, not only found against the company on the main case, but found that the defense was vexatious, and so included the penalty in the verdict.

The Supreme Court of the State sustained that verdict and affirmed the judgment upon it.

The case was then brought to this Court, where, following the precedent of the Ibs case, the judgment of the State court was reversed. The distinctions made by the State Court between this and the Ibs case, this Court said, "seem to us unreal".

The defense made by the company being held by this Court to be good against the impeachment of it by the plaintiff, cannot be said to have been vexatious.

The case was remanded to the Supreme Court of Missouri "for further proceedings not inconsistent with the opinion of this Court".

The Supreme Court of the State sent the case back to the court of original jurisdiction which proceeded, over the objection of petitioner, to try the case de novo (Rec., pp. 23, 30).

The Circuit Court permitted an amendment to the reply which alleged that the unpaid assessment was void because it included 15 cents on account of a tax levied by the State, which tax was alleged to be illegal, and therefore should not have been included in the assessment.

The case was submitted to the jury upon this issue, and the jury, under peremptory instructions, found against the company upon the main question, and again found that the defense was vexatious.

And again the verdict of the jury that the refusal to pay was vexatious had nothing to rest upon except the defense itself. And the plaintiff did not discover the avoidance of the defense, although it grew out of known facts of record, until after trial through the State courts, and not until upon argument in this Court.

In addition to this consideration is the fact that the petitioner was not dealing with its own funds or on its own account, but with trust funds and as a trustee. It "kept the books, levied the assessments, deposited the collections in the Mortuary Fund, and paid claims therefrom as they matured. It was not

otherwise liable on the policies" (Ibs case, 237 U. S., l. c. 666). The company was a trustee of the fund (Ibs case, 237 U. S., l. c. 671), and it owed a duty to the beneficiaries (the members) to protect that fund against unjust demands. In the instant case the insured had failed to pay an assessment which under the terms of his certificate rendered the same void.

The company could not, and did not, gain anything for itself by its refusal to pay, because, under the terms of the certificate, payment would have been made out of the "Mortuary Fund, and not otherwise" (Rec., p. 429). Payment, however, of an unjustified claim might seriously affect the company, and as a trustee it was entitled to the judgment of a court as to whether, under the circumstances, there was liability. In cannot be said, therefore, that the company acted in bad faith in its refusal to pay.

Notwithstanding these facts the trial court refused to give either of the instructions requested by petitioner (instructions Nos. XXIII to XXVI; Rec., pp. 408, 409), set out at page 16 hereof, but gave the instruction requested by respondent, authorizing the jury to assess penalty and attorneys' fee if the jury found and believed from "all the facts and circumstance shown by the evidence that its refusal to pay was vexatious, that is, without reasonable cause" (Rec., p. 391), and this ruling was affirmed by the

State Supreme Court, and in support of such affirmance the Court referred to its former decision in this case, 269 Mo., l. c. 42, where it said:

> "The submission of the question of damages and attorneys' fees to the jury was proper under the rule stated by this court in Keller v. Home Insurance Co., 198 Mo. 440, and Brown v. Assurance Co., 45 Mo., l. c. 227, where it is said that:
>
> "'The whole question of vexatious refusal or delay is a matter of fact to be determined by the jury. They must make up their verdict on this issue by a general survey of all the facts and circumstances in the case; and if, upon full consideration, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages. The statute will not admit of the construction contended for by the counsel for the plaintiff in error, that before damages are allowed it must be explicitly proved by the plaintiff that the delay or refusal was vexatious.'
>
> "We think that under this rule the evidence was ample to justify the submission of that question, and that the instruction of the Court properly defined the duty of the jury."

In the case of Bailey v. State of Alabama, 219 U. S. 219, 234, which involved the validity of a statute of Alabama, providing that the refusal or failure of a person who enters into a contract of service upon which he receives money or property to perform such service or refund the money shall be prima facie evidence of intent to defraud, this Court said:

> "It is no answer to say that the jury must find and here found that a fraudulent intent existed.

> The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding."

and this court reversed a conviction.

When the nature of the defense is the only evidence from which its character as being vexatious or not is to be inferred, then it is a question of law for the Court. Here is no dispute as to the fact. The company made a specific and definite defense. Does that prove that it was vexatiously made? If so, it must be that the defense was frivolous. Resting as it did upon conceded facts, to be vexatious it must be obviously without merit. It must be one repugnant to the lowest mind and unconscionable in its quality.

The Missouri Court of Appeals, in Stix v. Travelers Ins. Co., 175 Mo. App., l. c. 180, has said that "the fact that defendant declined to compensate the loss without litigation **is of itself evidence to prove the delay thereabout to be vexatious**".

If this is to be taken broadly and without taking into account the nature of the defense, it is opposed to the later and wholesome announcement made by the Supreme Court of Missouri, Division No. 2, in the case of Non-Royalty Shoe Co. v. Phoenix Ins. Co., 210 S. W. Rep., l. c. 42, which is as follows, viz.:

"We are convinced that a vexatious refusal to pay an insurance loss is not to be deduced from the mere fact that upon suit the verdict is adverse to the defendant (Patterson v. Insurance Co., 174 Mo. App. 44, 160 S. W. 59; Keller v. Insurance Co., 198 Mo. 440, 95 S. W. 983). If the fact of an adverse decision is to constitute the sole and decisive test, it would be fairly plain that this Court was in error when it held the statute to be constitutional; for it is only upon the fundamental ground of a vexatious refusal to pay that the penalty inflicted by the statute can be upheld. The defendant is to be allowed to entertain an honest difference of opinion as to its liability, or as to the extent of such liability under the contract of insurance, and to litigate that difference; otherwise, the provision of the statute is obviously so shot through with duress as to be invalid upon any view. It is from the very nature of the case, and from the protean form which the facts of the case assume, difficult, if not impossible, to frame any general rule for use in determining when a refusal to pay is vexatious and when it is not. Judge Trimble, of the Kansas City Court of Appeals, has announced a rule which commends itself to us so far as it goes, and it goes as far as it is wise or safe to go in announcing a rule to govern cases wherein the facts are as variant as we find them in insurance cases upon this question. This rule reads thus:

"'And while affirmative proof is not required to show vexatious refusal, yet the penalty should not be inflicted unless the evidence and circumstances show that such refusal was willful and **without reasonable cause** as the facts appeared to a reasonable and prudent man **before the trial**;

and merely because the judgment, after trial, is adverse to defendant's contention, is **no reason for inflicting the penalty**' (Patterson v. American Ins. Co., 174 Mo. App., loc. cit. 44, 160 S. W. 62)."

The contrariety of opinion by the Supreme Court of Missouri in the decision upon the former hearing of the case at bar (269 Mo., l. c. 42) and the case of Non-Royalty Shoe Co. v. Phoenix Ins. Co., 210 S. W. Rep., l. c. 42, last cited above, is undoubtedly due to the fact that the Supreme Court of Missouri is composed of two divisions, each having final jurisdiction of the cases decided by it.

The first decision was rendered by Division No. 1 while the last decision cited was by Division No. 2, the decision in the last case having been rendered several years later than the former.

The decision by Division No. 2 in the case of Non-Royalty Shoe Company v. Phoenix Insurance Company, had not been published when the instant case was argued in Division No. 1.

The law as laid down by Division No. 2 in the Non-Royalty Shoe case is plainly incompatible with the ruling in the instant case decided by Division No. 1, and is undoubtedly the law and should prevail upon the issue under discussion.

We respectfully submit that for the reasons herein stated the judgment of the Supreme Court of Missouri should be reversed.

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